In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-135

IRVING PROJANSKY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-272

GERALD LEAVITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with others in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to violate the federal securities and mail fraud laws (18 U.S.C.

371) and of substantive violations of the securities law (15 U.S.C. 78i(a)(2), 78ff(a)) in connection with a scheme to manipulate the price of the stock of the Hercules Galion Corporation. Projansky was sentenced to imprisonment for one year; Leavitt was sentenced to concurrent prison terms of one year, with execution of sentence suspended, and was fined $20,000. The court of appeals affirmed in a lengthy opinion which sets forth the facts in detail (Pet. App. 1a-36a). Its judgment was entered on June 22, 1972. Projansky filed his petition for certiorari on July 24, 1972. It is therefore out of time under Rule 22(2) of the Rules of this Court. A petition for rehearing filed by Leavitt was denied on July 18, 1972, and his petition for certiorari was timely filed on August 17, 1972.

1. Petitioners challenge the rule, which is followed in the Second and Ninth Circuits, that the trial judge may instruct the jury that the participation of any defendant in a conspiracy can be established by all the evidence in the case, including the acts and statements of co-conspirators. This may be done, however, only after the trial judge has made a "preliminary determination whether, if the testimony of the government witnesses is accepted as true, each defendant's own acts and statements show a connection with the conspiracy sufficient to justify the admission of the acts and statements of co-conspirators against him." *United States* v. *Baker*, 419 F. 2d 83, 88 (C.A. 2), certiorari denied, 397 U.S. 976. The older practice, which is still followed in other circuits, is for

the judge to charge the jury that, while all the evidence may be considered in determining whether a conspiracy existed, the jury must determine from independent proof of the defendant's own acts whether he was a member of the conspiracy, and that, if it so finds, it may then consider acts and declarations of co-conspirators in determining guilt beyond a reasonable doubt.

It is evident that the difference between the two rules relates only to whether the judge alone or the judge and jury should make the initial determination whether there is independent evidence of a particular defendant's connection with the conspiracy. Whichever rule is applied, once that initial determination is made, the jury may properly consider all the evidence, including declarations of co-conspirators, in determining guilt beyond a reasonable doubt. Since it is also established that only slight evidence is necessary to show a defendant's connection with an existing conspiracy,[1] it is evident that the difference in the two methods of presentation is more theoretical than real. That is particularly so in a case such as this where, as appears from the opinion below, there was ample evidence of individual acts by the petitioners to establish their connection with the conspiracy.

The Second Circuit rule results in presentation of the issues to the jury in a simpler and more compre-

[1] See *United States* v. *McGann*, 431 F. 2d 1104, 1107 (C.A. 5), certiorari denied *sub nom. Pruitt* v. *United States*, 401 U.S. 919, and cases cited.

hensible fashion than was required under the older procedure while, at the same time, it safeguards the rights of the defendant in that the judge must determine, as a matter of law, whether the evidence of his membership in the conspiracy is sufficient to warrant submission of that issue to the jury. This approach is consistent with the usual allocation of functions between judge and jury, which assigns to the judge the task of deciding preliminary questions of fact determinative of the admissibility of evidence. Accordingly, the Court has not considered this difference in procedure among the circuits to be an issue requiring resolution. In both *United States* v. *Jacobs*, 431 F. 2d 754 (C.A. 2), certiorari denied, 402 U.S. 950, and *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953, the same issue was explicitly raised by the petitions for writs of certiorari. There is no reason to review that issue in this case.

2. In deciding to grant the defendants sixteen peremptory challenges, the trial court also permitted the government to exercise eight, instead of six such challenges. The court of appeals declined to reach the question whether the grant of two additional peremptory challenges was error under Rule 24(b), F.R. Crim. P., finding that while petitioners did object to the granting of the additional challenges as a matter of fairness, they failed to call the court's attention to the claimed lack of power under the rules. The colloquy, set forth in full in the opinion below, shows that petitioners never based their objection on lack of power. It was appropriate in the circumstances

for the court below to hold petitioners bound by Rule 51, F.R. Crim. P., requiring explanation of the grounds for an objection. As the court noted (Pets. App. 35a), there has been no particular claim of prejudice, and a holding that Rule 24 as a matter of "plain error" automatically barred the convictions would vitiate a three-and-a-half month jury trial on a ground not brought to the trial judge's attention.

In any event, the grant of two additional peremptory challenges to the government would not be reversible error. The matter is not of constitutional dimension. Rule 24(b) does not, by its terms, prohibit the granting of additional peremptory challenges to the government, and the trial judge here manifestly intended the additional challenges for the government to be part of the conditions on which he exercised his discretion to grant additional challenges to petitioners and their co-defendants. In *New England Enterprises, Inc.* v. *United States*, 400 F. 2d 58, 69 (C.A. 1), certiorari denied, 393 U.S. 1036, the court held that, in the absence of a proper objection, there is no ground for reversal where unlimited peremptory challenges are allowed. Here only two additional challenges were granted to the government. There is no claim that the jury selected was not fair or impartial, and hence no claim of actual prejudice. Thus, even if the grant of the two additional challenges was improper, it was harmless.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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